

XVIII

The Shining Sixpence: Women's Worth in Canadian Law at the End of the Victorian Era

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ON TUESDAY EVENING, 7 April 1896, the body of a new-born infant girl, wrapped in a rough potato sack, washed up on the shores of the Nanaimo Harbour Beach, on the east coast of Vancouver Island. A group of startled children playing on the beach stumbled over it, and dumped the contents from the sack. As the *Nanaimo Free Press* would report the next day, the dead infant's body was "stark naked," with the exception of "a bright English six-pence," which was "loosely attached to the child's neck by a piece of string."¹

Infanticide was an unsavoury but surprisingly common feature of daily life in nineteenth century Canada. It was one of the tragic, but historically inevitable responses to the overwhelming problems posed by unwanted pregnancies. Despite the absence of modern contraceptive knowledge, many nineteenth-century heterosexual women endeavoured to limit the number of their offspring, using other methods such as abstinence from sexual intercourse, prolonged nursing, coitus interruptus, sheaths, pessaries, douches, and abortion where all else had failed.² But the law did not encourage such reproductive control. Indeed, as the century progressed criminal legislation against abortion, first enacted in New Brunswick in 1810, expanded nation-wide to prohibit the artificial termination of pregnancy at any stage of gestation, by whatever means.³ By 1892, parliament banned the sale,

¹ *Nanaimo Free Press*, 8 April 1896. This case is also discussed in C. Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: The Osgoode Society, 1991), chapter 4. Accounts were taken from the British Columbia Archives and Records Services [hereafter BCARS], GR 1327, No. 37/1896, Coroner's Inquest, Nanaimo, 16 April 1896; GR 419, Box 63, file 2/1896 Depositions, Brief for Crown *R. v. Balo*. See also, *Nanaimo Free Press*: 9 April 1896, 11 April 1896, 16 April 1896, 6 May 1896. I am indebted to Indiana Matters, then of BCARS for bringing this to my attention.

² For a discussion of the methods of reproductive control used in the nineteenth century, see Angus McLaren and Arlene Tigar McLaren, *The Bedroom and the State: Changing Practices and Politics of Contraception and Abortion in Canada 1880-1980* (Toronto: McLelland and Stewart, 1986); Angus McLaren, "Birth Control and Abortion in Canada 1870-1920" (1978) 59 *Canadian Historical Review* 319; Constance Backhouse, "Involuntary Motherhood: Abortion, Birth Control and the Law in Nineteenth Century Canada" (1983) 3 *Windsor Yearbook of Access to Justice* 61; Linda Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in America* (New York: Grossman, 1977); James C. Mohr, *Abortion in America* (Oxford: Oxford University Press, 1978).

³ For a detailed discussion of the common law and statutory positions on abortion in nineteenth century Canada, see Backhouse, *supra* note 2; Shelley Gavigan, "The Criminal Sanction as it Relates to Human Reproduction" (1984) 5 *Journal of Legal History* 20; *An Act... for the further prevention of the malicious using of means to procure the miscarriage of women*, 50 George III (1810), c. 2 (N.B.);

distribution and advertising of all contraceptives. That same year feminists demanding the right to "voluntary motherhood" inside marriage suffered the ultimate outside intervention, when parliament enacted an express exemption for husbands from charges of wife-rape.⁴

Infanticide had become, for many, a device of last resort. Bodies of newborn infants were frequently discovered in ditches, in privies, in stove pipes, in pails of water, inside hollow trees, buried in the snow, floating in rivers, at the bottom of wells, under floor-boards, and under the platforms of railway stations. Fifty or more such bodies were found by the coroner in the 1860s in each of Toronto and Quebec City alone. Not all of the bodies would have been found, of course, and even when they were, it was often impossible to determine who was responsible.⁵

News of the gruesome discovery in Nanaimo spread quickly through the bustling resource town. The finger of suspicion settled upon Anna Baló, a woman known to have been pregnant, who had abruptly taken flight from the city upon discovery of the infant's body. A 44 year old, married Finnish immigrant, the mother of six children, Anna Baló was an unusual suspect. Most women charged with infanticide in the nineteenth century were young, unmarried, domestic servants. Frequently they attempted to hide their pregnancy and childbirth, no doubt motivated by fear. Giving birth to an illegitimate child resulted in disgrace, termination of employment, and severely diminished job prospects for the single parent. For most of these women, harsh economic and social realities left virtually no options.

Most attempted to carry out concealment plans with courage and extraordinary determination. They had to keep normal appearances in front of employers and acquaintances despite pregnancy-related illnesses, disguising their growing bulk

as amended 9-10 George IV (1829) c. 21 (N.B.); *An Act to provide for the punishment of Offences against the Person*, 6 William IV (1836), c. 22 (P.E.I.); *An Act for consolidating... Offences against the person* 4-5 Victoria (1841), c. 27 (U.C.); *An Act respecting Offences against the Person*, 32-33 Victoria (1869) c. 20, s.59, 60 (D.C.); *The Criminal Code, 1892*, 55-56 Victoria (1892) c. 29, ss. 219, 271-4 (D.C.).

⁴ For legislation banning birth control, see *The Criminal Code, 1892*, 55-56 Victoria (1892) c. 29, s. 179 (D.C.). For discussion of the women's drive to obtain sexual control within marriage and the *Criminal Code's* exemption of husbands from rape convictions in 1892, see Constance Backhouse, "Nineteenth-Century Canadian Rape Law 1800-92" in David H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. II (Toronto: The Osgoode Society, 1983) 200.

⁵ For general discussion of nineteenth century infanticide in Canada, see Constance B. Backhouse, "Desperate Women and Compassionate Courts: Infanticide in Nineteenth-Century Canada" (1984) 34 *University of Toronto Law Journal* 447; Marie-Aimée Cliche, "L'Infanticide dans La Région de Québec 1660-1969" (1990) *Revue d'Histoire de l'Amérique Française* 31; W. Peter Ward, "Unwed Motherhood in Nineteenth-Century English Canada" CHA Historical Papers (Halifax, 1981) 34; Mary Ellen Wright, "Unnatural Mothers: Infanticide in Halifax 1850-1875" (1987) *Nova Scotia Historical Review* 13. For a comparative perspective, see Keith Wrightson, "Infanticide in European History" (1982) 3 *Criminal Justice History* 1; Peter C. Hoffer and N.E.H. Hull, *Murdering Mothers: Infanticide in England and New England 1558-1803* (New York: New York University Press, 1981); W.L. Langer, "Infanticide: an Historical Survey" (1974) 1 *The History of Childhood Quarterly* 353; R.W. Malcolmson, "Infanticide in the Eighteenth-Century" in J.S. Cockburn, ed., *Crime in England 1550-1800* (London: Methuen, 1977) 198; J.M. Beattie, *Crime and the Courts in England 1660-1800* (Princeton: Princeton University Press, 1986) 113-24. For details concerning the number of infants' bodies examined by the Toronto coroners, see Eric Jarvis, 'Mid-Victorian Toronto: Panic, Policy and Public Response 1856-73' (Ph.D. Thesis, University of Western Ontario, 1978) at 134-35. With respect to Quebec City, see Cliche, *supra* note 5, Tableau 1 at 35.

with layers of clothing and excuses. They would have to secure some degree of privacy in which to give birth unobserved, serve as their own midwife and do away with the child and its body before discovery. Afterwards, many tried to continue daily routines as if nothing had happened. Those who fell before any of these hurdles were caught and swept into the criminal justice system.⁶

It was unusual for married women to find themselves charged with infanticide. This may have reflected the fact that they were less likely to be involved in child-murder. Unlike single women they did not face life-altering shame at pregnancy. Furthermore, bearing and raising a child within a heterosexual marital unit was economically much more feasible than trying to do so alone. On the other hand the relative absence of accusations against married females may simply have reflected the greater difficulties of proof. Married women would rarely need to conceal their full pregnancy, could give birth openly, kill the child, and later declare that it had died of natural causes. With the collusion of their husbands, it would have been virtually impossible to obtain a conviction. The newspapers not infrequently reported incidents of "laying over," where infants were smothered or suffocated while sleeping in their parents' beds. Such situations were typically acclaimed "accidental" and criminal charges would not be pressed.⁷

Anna Balo's marital status did not protect her. The press duly recounted, "her husband [was] said to have deserted her three years ago."⁸ Legal prospects for a woman abandoned by her husband in nineteenth-century Canada were stark. In part, marital laws created a distinctly gender-skewed family unit. The English common law "doctrine of marital unity" transported to all Canadian jurisdictions except Quebec, held that the legal personality of the wife was absorbed by her husband. "By marriage, the husband and wife are one person in law," wrote eighteenth-century English jurist Sir William Blackstone, leaving no doubt that the "one person" was the husband. Upon marriage, a woman forfeited the right to manage all of her real estate, although she did not actually lose ownership in the property. All rents and profits from the land flowed by right to her husband during the marriage. Married women were legally incapable of contracting, suing, or of being sued in their own names. Indeed, women were only permitted to carry on business separately from their husbands if they had their spouses' consent. Furthermore, all personal property belonging to the wife, including her wages, transferred absolutely to her husband.⁹

⁶ For details of the typical infanticide prosecutions, see Backhouse, *supra* note 2.

⁷ See for example, the *Toronto Weekly Leader*, 15 December 1858, where it was reported that Mrs. Meuto of Yorkville awoke one morning to find her twelve-week old infant lying dead in her arms. The coroner's inquest delved mainly into the reputation of the parents. As the paper recounted, "the evidence elicited at this inquest was sufficient to satisfy the jury that the parents were respectable and strictly sober persons, and a verdict was therefore returned that the child was accidentally suffocated."

⁸ *Nanaimo Free Press*, 1 April 1896.

⁹ In return for these legal privileges over marital property, husbands were legally liable for their wives' debts, torts, and contracts. For a full discussion of the English common law rules of married women's property and their reception into English-Canadian jurisdictions, see Constance Backhouse, "Married Women's Property Law in Nineteenth-Century Canada" (1988) 6 *Law and History Review* 211. See also William Blackstone, *Commentaries on the Laws of England* vol.1 (London 1765); Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (Toronto: University of Toronto Press 1983) 30-1.

A few wealthy women were able to protect their property through recourse to highly technical "equitable" exceptions to the common law, but for the bulk of women there was no recourse.¹⁰

In Quebec, the rules for property and status derived from the *Coutume de Paris* and, after 1866, from the *Civil Code of Lower Canada*. Quebec women experienced the same legal incapacity upon marriage as women in the rest of Canada. They could not contract, take legal action or start a business without their husbands' authorisation. But they were not subject to the English "doctrine of marital unity." French marriage built on the legal concept of "community of property." All property that the two spouses obtained after the marriage became "jointly" owned. The catch was that the husband alone had the lawful right to administer and dispose of it. Couples could opt out of this system, but only in advance, by signing special marriage contracts permitting a wife to retain control over her own property. The extent to which women and their families managed to bargain such exemptions remains unclear.¹¹

Although Quebec law did not change significantly throughout the nineteenth century, after 1851 the law of married women's property began to experience incremental reform in the common law provinces. Prodded by women's rights activists, provincial legislatures slowly enacted a cross-section of new statutes increasing the ability of married women to control their own property. It would take British Columbia women until 1873 to obtain control over their property and their wages. Restrictions such as requirements for written spousal consent and court orders for protection continued to plague women in Nova Scotia and Prince Edward Island into the twentieth century.¹² Canadian judges displayed widespread uneasiness over

¹⁰ The injustice of the common law rules had become apparent as early as the late sixteenth century in England, where the courts of chancery developed a body of equitable precedents that undermined the doctrine of coverture and permitted women to retain their property separately through devices such as ante-nuptial and post-nuptial contracts, marriage settlements and trusts: Maria Cioni, *Women and Law in Elizabethan England, with Particular Reference to the Court of Chancery* (New York: Garland, 1985). In Canada the courts of chancery were by no means as well established, and access to lawyers experienced in equity was at a premium. The sheer expense of tying up estates in trust settlements was another major impediment. George Smith Holmsted, writing at the turn of the century, concluded that for Canadians, marriage settlements were "as a rule enjoyed by the few only who could indulge in [this] luxury ... ; to the ordinary run of married women they were a dead letter": *The Married Women's Property Act of Ontario* (Toronto, 1905) 1-6. For a more detailed description of common law rules and equitable precedents, and the various exceptions to them, see Backhouse, *supra* note 9. For a full discussion of the English provisions, see Holcombe, *supra* note 9.

¹¹ The wife retained property received as an inheritance or gift from her parents, although the husband had access to any profits made on these assets. For a more detailed description of the Quebec married women's property law, see Marie Gérin Lajoie, "Legal Status of Women in the Province of Quebec" in *Women of Canada: Their Life and Work* (Ottawa: National Council of Women of Canada, 1990) at 41-50; Micheline Dumont, *et al.*, *Quebec Women: A History* (Toronto: Women's Press, 1987) 68-128, 254-55; André Morel, "La libération de la femme au Canada: Deux itinéraires" (1970) 5 *La Revue Juridique Thémis* 399-411; Michelle Boivin, "L'évolution des droits de la femme au Québec: un survol historique" (1986) 2 *Canadian Journal of Women and the Law* 53.

¹² *An Act to Extend the Rights of Property of Married Women*, 36 Victoria (1873), c. 29. See Backhouse, *supra* note 9, for details of the reform legislation throughout the nineteenth century. The reasons for statutory reform were varied, ranging from a desire to preserve married women's property from seizure for husbands' debts during time of economic downturn, through an egalitarian concern to improve the legal status of married women.

these statutory reforms, repeatedly dispensing rulings which watered down the new rights and freedoms.¹³

It was difficult enough for some women to manage in the face of discriminatory property laws, even within a stable marital unit; but for deserted women such as Anna Balo, the situation was intolerable. Consigned to legal non-existence through patriarchal doctrines, they were left in the unenviable position of trying to enforce dependence upon a man who had balked his moral and economic obligations by abandoning his child. Responding to the desperate situation of deserted women, several colonial legislatures had passed reform statutes permitting such women to obtain limited rights over marital property after abandonment. The legislature of Vancouver Island had enacted one such statute in 1862, in response to a wave of desertions in the wake of the Fraser River and Cariboo gold rush.¹⁴ But Anna Balo would have required a court order to give her control over her own wages and property under this legislation, and few poor immigrants made any practical use of the provisions.

Nor was Anna Balo, deserted for three years, offered much by way of access to divorce. Canadian divorce law differed greatly depending upon the province of one's residence, but for most nineteenth-century heterosexual couples, marriage was a tie for life. English tradition derived ultimately from ecclesiastical canon law and forbade divorce, although the English parliament allowed private bills to pass granting divorces to named individuals, almost always members of the aristocracy. The English position, first adopted in Upper Canada in 1839, typically provided divorce only to men whose wives had committed adultery. Utilising a blatant double standard, the English rules forced a woman seeking divorce to prove not only that her husband had committed adultery but that he had been guilty of some other serious crime, such as incest or bigamy.¹⁵ In neighbouring Lower Canada, the environment

¹³ See Backhouse, *supra* note 9, for a detailed analysis of the nineteenth century judicial rulings regarding married women's property. Scornful of the legislative goals and palpably concerned about the dangers such reform measures posed for the Canadian family, the majority of nineteenth-century judges embarked upon a campaign of statutory nullification. They consistently refused to grant women the right to dispose of their property, they restricted married women's right to contract, they refused to recognise domestic labour as work done for separate wages, and they narrowly construed what constituted "separate property" and what constituted a "separate" business undertaking, giving married men control over the vast bulk of family assets and business ventures.

¹⁴ *An Act to Protect the Property of a Wife Deserted by her Husband, 1862, Public Statutes of the Colony of Vancouver Island 1859-1863*, c. 51 at 20. For a discussion of the other "marriage breakdown" statutes, passed in New Brunswick in 1851 (as amended in 1869 and 1874), Prince Edward Island in 1860, and Nova Scotia in 1866; see Backhouse, *supra* note 9. In other geographic areas, there was no relief at all. The grave injustices this could cause were starkly evidenced by the case of *Whibby v. Walbank* (1869), 5 Nfld. R. 286 (S.C.). James Whibby had abandoned his wife, Mary, and four children sixteen years earlier, but returned upon his wife's death to lay claim to the wages she had managed to put together from years of labouring as a washerwoman. Newfoundland Chief Justice Sir H.W. Hoyles ruled categorically that James Whibby was fully entitled to Mary's earnings.

¹⁵ For discussion of divorce law generally, see Constance Backhouse, "Pure Patriarchy: Nineteenth-Century Canadian Marriage" (1986) 31 McGill Law Journal 265; Constance Backhouse, *supra* note 1, chapter 6. By the time of Confederation, only seven *ad hoc* petitions had been presented to the Legislature of Upper Canada (and later to the Legislature of the United Province of Canada). Two were abandoned, four were granted, and one was granted but later disallowed; see Backhouse, *ibid.* at 270. See Mary Lyndon Shanley *Feminism, Marriage, and the Law in Victorian England 1850-1895*

was even less hospitable for those seeking divorce. French law transported to Quebec simply never recognised the concept of divorce. The *Civil Code of Lower Canada*, enacted in 1866, stated: "Marriage can only be dissolved by the natural death of one of the parties; while both live it is indissoluble."¹⁶

The Maritime provinces had traditionally been somewhat more tolerant of divorce. Legislation enacted in Nova Scotia in 1758, in New Brunswick in 1791, and in Prince Edward Island in 1833, permitted divorce to either spouse on grounds such as adultery, impotence, frigidity, and cruelty. Nova Scotia briefly recognised an additional ground of "wilful desertion while withholding necessary maintenance for three years" from 1758 to 1761, at which point this ground was deleted from the statutory list.¹⁷ The Maritimes led the rest of the country in divorce rates, but even so the numbers remained small. The 1881 census revealed the ratio of divorced to married people in Nova Scotia and New Brunswick (the two provinces with the highest divorce rates) as 1:2608 and 1:2350 respectively.¹⁸

(Princeton: Princeton University Press, 1989) 36, for a discussion of the English situation.

¹⁶ The French law was stated by Judge René-Edouard Caron, President of the Commission responsible for drafting the Quebec Civil Code: "Le divorce n'a jamais existé pour nous comme faisant partie des lois françaises."; see John E.C. Brierley "Quebec's Civil Law Codification" (1968) 14 McGill Law Journal 521 at 560. See also *Civil Code of Lower Canada* (1865) 29 Victoria c. 41, art. 185. In Quebec, couples could obtain *séparation de corps* (separation from bed and board), which was in the nature of a legal separation. Discriminatory standards affected this remedy as well: a husband could obtain *séparation de corps* with proof of his wife's adultery; a wife had to prove that her husband was keeping his concubine in their common habitation: see arts. 187, 188.

¹⁷ The grounds, which also included kinship within the prohibited degrees, varied over the years and between jurisdictions. For more detailed discussion of the grounds, see Backhouse, *supra* note 9. *An Act concerning Marriages, and Divorce, and for punishing Incest and Adultery, and declaring Polygamy to be Felony* 32 George II (1758), c. 17 (N.S.); as amended 1 George III (1761), c. 7 (N.S.); 56 George III (1816), c. 7 (N.S.); 29 Victoria (1866), c. 13 (N.S.). *An Act for regulating Marriage and Divorce, and for preventing and punishing Incest, Adultery and Fornication* 31 George III (1791), c. 5 (N.B.); 48 George III (1808), c. 3 (N.B.); 4 William IV (1834), c. 30 (N.B.); 6 William IV (1836), c. 34 (N.B.); 10 Victoria (1847) c. 2 (N.B.); 23 Victoria (1860) c. 37 (N.B.). See also *An Act for Regulating Marriage and Divorce, and for Prohibiting and Punishing Polygamy, Incest, and Adultery*, Provincial Archives of New Brunswick R.S. 24 S1-B6 (1786 New Brunswick); and P.A.N.B. R.S. 24 S2-B5 (1787 New Brunswick) for earlier drafts which were not formally enacted. *An Act for Establishing a Court of Divorce and for preventing and punishing Incest, Adultery and Fornication* 3 William IV (1833), c. 22 (PEI), as amended 5 William IV (1835), c. 10 (PEI).

¹⁸ For statistical details of the operations of the Nova Scotia and New Brunswick courts see Kimberley Smith Maynard, "Divorce in Nova Scotia 1750-1890" in Philip Girard and Jim Phillips, eds., *Essays in the History of Canadian Law: Vol. III, Nova Scotia* (Toronto: The Osgoode Society, 1990) and Angela Crandall, "Divorce in 19th Century New Brunswick: A Social Dilemma" [unpublished, 1988]. By 1890 the Nova Scotia matrimonial court had dealt with between 150 and 200 divorce applications. Maynard noted that of the 44 petitions in which cause and outcome were recorded, 34 received divorces: "Table Two: Divorces by Cause." By 1900 the New Brunswick court had dealt with approximately 130. Crandall found that approximately half of the New Brunswick applications were granted. There has been some difficulty determining the number of divorce applications in Prince Edward Island prior to 1900. In an earlier article I erroneously suggested that here had been none: see Backhouse, *supra* note 15 at 270. Maynard cited only one application in her "Divorce in Nova Scotia." Jack Bumsted and Wendy Owen uncovered three applications in their "Divorce in a Small Province: A History of Divorce on Prince Edward Island from 1833" in (1991) 20 *Acadiensis* 20 at 86: Peter Fisher's petition in 1833 spawned the passage of the 1835 legislation, although there are no further records on whether he carried through with his application after the new statute was passed. Two other divorce applications achieved success: *Collings v. Collings* 1840-31, Public Archives of Prince Edward Island 2810/141-2 and *Capel v. Capel*, 1864, referred to in an assault decision, Public Archives

Although Confederation turned matters of divorce over to the federal government in 1867, parliament did not manage to pass a general divorce statute until well into the twentieth century. In the vacuum after 1867, the Maritime provinces continued to follow their own laws.¹⁹ The federal government began haltingly to exercise its original jurisdiction, adopting the English policy of passing private statutes of divorce in individual cases. Citizens of Ontario, Manitoba, and the North West Territories who availed themselves of this option found that parliament continued to follow the sexual double standard in most cases.²⁰ The year 1888 marked the first time that a woman procured a parliamentary divorce on grounds of her husband's adultery alone.²¹

In British Columbia, the law which governed Anna Baló was explicitly biased with respect to gender. Courts of that province chose to adopt the discriminatory English law, permitting men to obtain divorce upon proving simple adultery. By contrast, women were required to prove "incestuous adultery, or bigamy with adultery, or rape, or sodomy or bestiality, or adultery coupled with cruelty ... , or adultery coupled with desertion without reasonable excuse for two years or upwards."²² Lacking proof of adultery, rape, sodomy or bestiality on the part of her husband, the law irrevocably tied the deserted, pregnant Anna Baló to her missing husband for life.

of Prince Edward Island, Supreme Court Reports, Case Papers, 1864 (no divorce records apparently survive in this case.) For census details, see R. Pike, "Legal Access and the Incidence of Divorce in Canada: A Sociohistorical Analysis" 12 (1975) *Canadian Review of Sociology and Anthropology* 115. Quebec had the lowest divorce ratio, at 1:62,334.

¹⁹ The *British North America Act*, (1867) 30-31 Victoria, c. 3, s. 91(26). England gave jurisdiction over divorce to parliament, but s. 129 laid the foundation for provincial divorce courts to continue when it provided that the laws then in force, and all the courts of civil and criminal jurisdiction, should continue in Ontario, Quebec, Nova Scotia and New Brunswick.

²⁰ Between 1867 and 1900, only sixty-nine such divorces were granted by parliament. See Backhouse, *supra* note 15 for a list of the parliamentary divorces (at 276), and fuller legal analysis of why individuals from these provinces adopted the practice of applying to parliament (at 271-79). For Ontarians, there were simply no other options; for citizens from Manitoba and the North West Territories (then including Saskatchewan and Alberta), it was more a matter of custom.

²¹ The Canadian parliament theoretically was not bound to impose a sexual double standard and the senators insisted that there were no arbitrary rules respecting divorce, each case being considered on its own merits. John Gemmill proudly proclaimed that parliament had generally abolished the sexual double standard in his 1859 treatise, but *An Act for the Relief of Eleanora Elizabeth Tudor*, 51 Victoria (1888), c. 11 (D.C.), was the first such decision. The case spawned an intense legal confrontation over the pros and cons of the sexual double standard. While some argued that the 1888 case had abolished the inequality of treatment, by the turn of the century only three other women had fared as well: Gemmill, *Bills of Divorce* 22; Backhouse, *supra* note 14 at 284-91.

²² The law of reception in British Columbia provided that the province should apply the law of England as of 19 November 1858: "Proclamation" by His Excellency James Douglas, Governor, Colony of British Columbia, 19 November 1858; *English Law Ordinance*, 1867 Cons. S.B.C. 30 Victoria (1877), c. 103; see also R.S.B.C. 1897, c. 62. In *M. falsely called S. v. S.* (1877), 1 B.C.R. 25, the British Columbia Supreme Court ruled that it had jurisdiction to apply the English divorce law. Noting that Nova Scotia and New Brunswick had been granting divorces for over a century, Judge John Hamilton Gray pronounced them "England's more practical Colonies." Manitoba and the North West Territories were in similar legal situations, but their courts did not follow the British Columbia lead in the nineteenth century; see Backhouse, *supra* note 15 at 278-79. The English divorce law so received was *An Act to Amend the Law Relating to Divorce and Matrimonial Causes in England*, 20-21 Victoria (1857), c. 85 (Eng.).

Anna Baló's abrupt departure from Nanaimo, upon discovery of the dead infant's body on April 7th, triggered the suspicion of authorities. Frantic with fear, she had abandoned her six children and fled north on foot. Before police caught up with her a day and a half later, Anna Baló had walked thirty miles to Qualicum.²³ Arrested on April 10th, she was back in Nanaimo for arraignment in police court the next morning. Dr. Robert S.B. O'Brian entered the county gaol to examine the prisoner that afternoon. "I asked her a few questions and examined her breasts and they had the appearance of a woman that had lately been confined," he would later testify. Almost immediately thereafter, Anna Baló broke down and confessed to being the mother of the dead infant.²⁴

Speaking through a Finnish interpreter, whose services had been requisitioned because Anna Baló was unable to understand English, the distraught woman told Police Chief Crossan that the child was indeed hers. Of how she had come to be pregnant, she said not a word. Gossip and rumours had been circulating within the Finnish community of Nanaimo, but whether Anna Baló's pregnancy was the result of a consensual heterosexual relationship or a forcible seduction or rape will never be known.²⁵ Anna Baló's admission was that she had given birth at home one week previously on April 4th. The child had died almost immediately after its birth, she stressed. Trying to dispose of its body, she had wrapped it in an empty potato sack and deposited it upon the beach of the Nanaimo Harbour.²⁶

This confession catapulted Anna Baló immediately into a full-scale coroner's inquest and subsequent trial at the Spring Assizes of the Supreme Court of British Columbia in May. Throughout these proceedings, she was unrepresented by legal counsel. There was no indication from court records that anyone advised the accused woman that she would do well to retain a lawyer. Indeed it was not until 1836 in England that persons accused of a crime were unequivocally granted the right to defence counsel at all. There was no institutionalised legal aid available; many nineteenth-century accused without funds were simply out of luck.²⁷

For Anna Baló, finding the financial resources to retain legal assistance was out of the question. A deserted wife trying to cope with six children, she was the victim of acute financial distress. Even for single women without child-care responsibilities, employment opportunities were limited. Customarily relegated to the fields of

²³ *Nanaimo Free Press*, 11 April 1896.

²⁴ *Ibid.*, 11 April 1896; and BCARS GR 419, Box 63, File 2/1896, Deposition.

²⁵ For a reference concerning the community rumours, see BCARS, Deposition; Coroner's Inquest. An abundance of legal records of rape trials and seduction lawsuits suggests that coercive male sexuality was a serious and continuing threat to many nineteenth century Canadian women. See Backhouse, *supra* note 14; Constance Backhouse "The Tort of Seduction: Fathers and Daughters in Nineteenth-Century Canada" (1986) 10 *Dalhousie Law Journal* 45; Backhouse, *supra* note 1, chapters 2 and 3.

²⁶ *Nanaimo Free Press*, 11 April 1896.

²⁷ For a discussion of the development of the right to counsel, see P. Romney, *Mr. Attorney: The Attorney-General For Ontario in Court, Cabinet and Legislature 1791-1899* (Toronto: The Osgoode Society, 1986) at 208. John Beattie has explained the historical reluctance to permit defence lawyers into the criminal justice process by quoting William Hawkins, whose *Pleas of the Crown* was published in England between 1716 and 1721. Hawkins wrote that "it requires no manner of skill to make a plain and honest defence, which in cases of this kind is always the best." Beattie, *supra* note 5 at 356.

domestic service, seamstressing, nursing, shop clerking, factory work and teaching, women found working conditions strenuously difficult and their efforts poorly paid.²⁸ Occasionally legal intervention barred women's access to certain jobs entirely. Statutes passed in British Columbia in 1877 and Ontario in 1890 rendered mining off-limits to women.²⁹ Manitoba prohibited women from serving liquor in bars in 1886.³⁰ Prostitution, a traditional female occupation, came increasingly within the reach of the criminal law throughout the nineteenth century, as social purity reformers sought to eradicate the gender-imbalanced trade in sexual services.³¹

Finnish immigrant women typically found jobs as domestic servants, but Anna Balo's large family would have obliterated most job prospects.³² One of her sons was apparently helping to support the family by working in the Dunsmuir coal mine, but his earnings were simply not enough for seven mouths. The tightly-knit Finnish community of Nanaimo was unable or unwilling to extend sufficient support to

²⁸ For a discussion of nineteenth century protective labour legislation affecting women, see Backhouse, *supra* note 1, chapter 9. Ramsay Cook and Wendy Mitchinson, eds., *The Proper Sphere: Woman's Place in Canadian Society* (Toronto: Oxford University Press, 1976) 166, noted that in 1901 the largest percentage of women were still employed either as domestic servants, dressmakers, or seamstresses. As the new century dawned, however, jobs for women were slowly beginning to expand. Nursing and teaching were most frequently mentioned, and by 1900 the National Council of Women of Canada listed the following occupational pursuits as open to women: musicians, actresses, artists, authors, journalists, printers, masseuses, midwives, stenographers, secretaries, factory inspectors, librarians, civil servants, farmers, horticulturists. A small number of women were acknowledged to have entered medicine, dentistry and pharmacy. National Council of Women of Canada, *supra* note 11 at 47, 63.

²⁹ *An Act to make Regulations with respect to Coal Mines*, 40 Victoria (1877), c. 122 (B. s. 3, 7, 10, 55, abolished women's labour underground in the coal mines. See also 46 Victoria (1883), c. 2 (B.C.) and C.S.B.C. 1888, c. 84. For no apparent reason, all of these restrictions were repealed in 1892: *An Act to amend the "Coal Mines Act,"* 55 Victoria (1892), c. 31 (B.C.), s. 1. Without explanation, they were enacted again in 1897: *An Act to make Regulations with respect to Coal Mines*, R.S.B.C. 1897, c. 138. *An Act to amend the "Coal Mines Regulation Act,"* 53 Victoria (1890), c. 33, s. 1 (B.C.), added the words "and no Chinaman" to the prohibited groups. *An Act to amend the "Coal Mine Regulation Act,"* 62 Victoria (1899), c. 46, s. 1 and 2 (B.C.) added the words "or Japanese." The wording of the latter amendment was peculiar since it was not restricted to Japanese men. Women were already excluded, but presumably the legislators did not think Japanese women fit within the generic term. See also, *An Act for securing the Safety and Good Health of Workmen engaged in or about the Metalliferous Mines in the Province of British Columbia by the appointment of an Inspector of Metalliferous Mines*, R.S.B.C. 1897, c. 134, s. 12, which extended these provisions to metalliferous mines. *An Act respecting Mining Regulations*, 53 Victoria (1890), c. 10, s. 2, 4, 8 and 18 (Ont.) barred women from underground and surface work at mines. See also, *An Act respecting Mines*, R.S.O. 1897, c. 36.

³⁰ *An Act respecting the sale of Intoxicating Liquors, and the Issue of Licenses there*, 49 Victoria (1886), c. 21, s. 27 (Man.). Maximum fines of \$100, or four months in default thereof, were set out in s.91. Exception was made for service in the dining room and for family members of the owner. See also, 52 Victoria (1889), c. 15 (Man.); R.S.M. 1891, Vol. 1, c. 90.

³¹ For a detailed discussion, see Constance Backhouse, "Nineteenth-Century Canadian Prostitution Law: Reflection of a Discriminatory Society" (1985) 18 *Social History* 387; Backhouse, *supra* note 1, chapter 8. See also the essay by John McLaren, *infra* at p. 567.

³² For details about the experience of Finnish women who immigrated to Canada, see Varpu Lindstrom-Best, *Defiant Sisters: A Social History of Finnish Immigrant Women in Canada* (Toronto: Multicultural History Society of Ontario, 1988) 22, 23, 26, 84-5, 140 and Varpu Lindstrom-Best "I Won't Be a Slave! - Finnish Domesticity in Canada 1911-30" in Jean Burnet, ed., *Looking into My Sister's Eyes* (Toronto: Multicultural Society of Ontario, 1986) 33.

relieve the Balos. The family's financial situation became so precarious that the City of Nanaimo had been forced to provide a small welfare pension of \$5 a week.³³ This level of impoverishment meant that legal representation was beyond hope.

The coroner's inquest opened on April 9th, before the Nanaimo Coroner, Lewis Thomas Davis, and seven jurymen.³⁴ The all-male composition of the tribunal was unremarkable for an era in which women were almost universally denied formal participation within legal and political structures. Throughout the century women had been forbidden the vote in provincial and federal elections, and could not sit as elected representatives for provincial legislatures or the Dominion parliament.³⁵ Not one woman sat as coroner, justice of the peace, police magistrate, or judge for the entire century. Coroner's juries and trial juries were composed solely of men.³⁶ Clara Brett Martin, the first white woman admitted to the profession of law in the British Commonwealth, called to the bar in Toronto on 2 February 1897, was the

³³ *Nanaimo Free Press*, 11 April 1896. For details of the Finnish community, see E. Blache Norcross, *Nanaimo Retrospective: The First Century* (Nanaimo: 1979); Lindstrom-Best, *ibid.*, "Defiant Sisters" 23, 140. The newspaper revealed that an unnamed male Finn had been the first to tip off the authorities regarding his suspicion of Anna Balo. This, combined with the evidence against Anna Balo produced by other Finnish neighbours, suggested that the deserted woman was an outcast even within her own ethnic community. Anna Balo had violated several important social maxims that were firmly entrenched within the Finnish community. First, she had become pregnant and borne a child as a single parent. There was no great stigma attached to being single within the Finnish immigrant community, and common law marriages were widespread. However sexual activity outside of a stable family unit was still viewed as a serious transgression. Second, infanticide was relatively uncommon among the Finnish population, many of whom had acquired comparatively more sophistication regarding birth control and abortion practices than the general population. Third, Anna Balo had abandoned her other children in her acute distress following childbirth. The Finns were widely admired for their child-rearing skills, and generations of public officials would attest that they were model immigrants in their abilities to rear healthy, well-scrubbed, educated children. It is likely that Anna Balo's flight to Qualicum, leaving behind her impoverished children to fend as best they could, shocked the Finnish community as much as the discovery of the infant's body. For descriptions of the Finnish immigrant community's perspectives regarding marriage, sexual relationships, and child-rearing, see Lindstrom-Best, *ibid.* at 59–78, 111–14.

³⁴ The inquest opened before Anna Balo's arrest in order to examine the body of the dead infant. After the jurors viewed the body, they turned it over to Dr. O'Brian for a post-mortem examination. His report was filed when the inquest resumed on April 16th.

³⁵ See Catherine Cleverdon, *The Woman Suffrage Movement in Canada* (Toronto: University of Toronto Press, 1974); Carol Bacchi, *Liberation Deferred? The Ideas of the English-Canadian Suffragists 1877–1918* (Toronto: University of Toronto Press, 1983). In contrast, the nineteenth century witnessed a marked broadening of the franchise for white men, although racial minority groups such as Chinese and Aboriginal men were not included in the widening electoral process. There was some evidence that certain propertied white women exercised the vote despite their theoretical exclusion. For example, some women in Lower Canada voted between 1792 and 1834, and were allowed to do so by the returning officers. But specific legislative exclusions were enacted against female voting in New Brunswick in 1791, Prince Edward Island in 1836, the United Province of Canada in 1849, and Nova Scotia in 1851. Electoral politics on local matters was more inclusive of women; unmarried women could be elected to school boards and could vote in municipal elections in many jurisdictions. See Alison Prentice, *et al.*, *Canadian Women: A History* (Toronto: Harcourt Brace Jovonavitch, 1988) 98–100, 174–88; Cleverdon, *ibid.* at 5.

³⁶ Cleverdon, *ibid.*, 67, 73–4, 102 noted that Emily Murphy, appointed a police magistrate in Edmonton, Alberta on 13 June 1916, was the first woman in the British empire to hold such a post. Alice Jamieson, appointed in December 1916 in Calgary, was the second. British Columbia first permitted women to serve as jurors in 1922.

only nineteenth-century Canadian woman to challenge the all-male legal system from within.³⁷

Dr. O'Brian, who conducted the post-mortem examination on the infant's body, testified at length to the coroner's inquest. Noting that the child had been dead some time before it was immersed in water, the doctor concluded that death had occurred during delivery, possibly before full legal birth or immediately thereafter. The infant had been slightly premature, had apparently drawn breath and then died, although from what cause the doctor could not ascertain.³⁸

Mrs. Anna Sharp, the Finnish woman who lived on Pine Street, opposite the Balos, was called next. She stated that she had known Anna Balo for the past five years, but that she had "never been on very good terms" with her. Anna Balo had become quite reclusive since the fall, and although many of the neighbours were curious, no one knew for sure if she was indeed pregnant. Mrs. Sharp was just one of the local Finnish women who made a point of visiting Anna Balo to learn more. It was early in March, she told the inquest, and "I went to see Mrs. Balo but she put me out of the house for talking about her, and I never went back again" Nevertheless, she was able to assure the jurors: "I then saw it with my own eyes that she was pregnant." Unable to write or sign her name, Anna Sharp completed her deposition by placing an "X" beside her name.³⁹

The next witness was none other than Alexandra Balo, Anna's twelve-year-old daughter. How she felt about testifying is not clear, but it was obvious that she was quite ignorant about her mother's status. In fact, she told the inquest, she did not even know when her mother had been arrested. Under close questioning, Alexandra admitted that her mother had been sick about two weeks' ago. "My mother was awfully white," she admitted, and she "told me that I couldn't go to school because she was sick." Instead, Anna Balo sent Alexandra off downtown to purchase 50¢ worth of alcohol for medicinal purposes. When Alexandra returned Anna Balo mixed the alcohol with some warm water and sugar and drank it. Young Alexandra was terribly anxious to get back to school. This time her mother was too weak to argue. "Go if you want to, I can't do anything because I am sick," she yielded from her bed.⁴⁰

What Alexandra discovered when she returned from school made her decide to stay home for the next week. There was blood on the floor in her mother's bedroom, blood on the bedspread, and blood on some of her mother's dresses. Anna told Alexandra to wipe up the blood on the floor, but she got up herself and washed the bedclothes and dresses. Although Alexandra could not be certain, she told the inquest that she thought her mother had left the house for a few hours several days later. "I

³⁷ For a more detailed discussion of Clara Brett Martin's admission and career, see Constance Backhouse, *supra* note 7, chapter 10; Constance Backhouse, "To Open the Way for Others of My Sex: Clara Brett Martin's Career as Canada's First Woman Lawyer" (1985) 1 *Canadian Journal of Women and the Law* 1; Theresa Roth, "Clara Brett Martin – Canada's Pioneer Woman Lawyer" (1984) 18 *Law Society of Upper Canada Gazette* 323.

³⁸ BCARS, Deposition; Coroner's Inquest.

³⁹ BCARS, Coroner's Inquest.

⁴⁰ BCARS, Coroner's Inquest; Deposition.

did not see her take anything with her when she went away," she added. Rather plaintively she tried to excuse her inability to answer all of the questions: "I am twelve years of age. Mother didn't tell me anything more," she repeated.⁴¹

Perhaps the most damning piece of evidence concerned that shiny English sixpence. Alexandra was asked about it at some length and her reply was devastating. "There was a sixpence in the house which my mother and myself thought was no good," she admitted. "It was kept in the cupboard, and the morning my mother went away I went to look for the sixpence and could not find it." The sixpence coin that had been found on the infant's body was then produced, and Alexandra identified it as the same one.⁴²

It is hard to know how Alexandra could have been so certain of the identity of the sixpence coin. Perhaps it was damaged in some way that left it both unusable and easily identifiable. In any event, its identification clearly traced the infant's body to the Balo home. With that, the evidence drew to a close. Anna Balo was asked whether she wished to have the testimony re-read to her and, through her interpreter, she responded "no." Asked whether she wished to give a formal statement herself, she replied, again through the interpreter, "Nothing to say."⁴³

The coroner's jury retired to consider their findings. Despite the damaging revelations of Anna Sharp and Alexandra Balo, the complexity and contradictions inherent in the medical evidence seemed to have been the predominant concern. The verdict reflected the jurors' uncertainty over the cause of death. "We the Jury find that the child found on the Beach on the 7th of April died during Child Birth", they inscribed on the formal "Inquisition" document. And with that, they adjourned, having neither condemned nor exonerated Anna Balo.⁴⁴

That same day, Police Magistrate J.H. Simpson committed Anna Balo for full trial at the Spring Assizes. Given the inability of the medical experts to ascertain the cause of death, she was not charged with either murder or manslaughter. Instead the charge was "concealment of a birth," a *Criminal Code* offence which read as follows:

s. 240. Every one is guilty of an indictable offence, and liable to two years' imprisonment, who disposes of the dead body of any child in any manner, with intent to conceal the fact that its mother was delivered of it, whether the child died before, or during, or after birth.⁴⁵

This offence, originally punishable by death, had first appeared in New France in 1722, spreading in the early nineteenth-century to the colonial jurisdictions of Lower Canada, Nova Scotia, New Brunswick, Prince Edward Island, Newfound-

41 BCARS, Deposition; Coroner's Inquest.

42 BCARS, Coroner's Inquest; Deposition.

43 BCARS, Deposition.

44 BCARS, Coroner's Inquest.

45 *Criminal Code*, 1892, 55-56 Victoria (1892), c. 29, s. 240 (Dominion of Canada).

land, and Upper Canada.⁴⁶ In its original form, the offence of concealment was an attempt by all-male legislators to address the difficulties of obtaining murder convictions against women who committed infanticide. Authorities claimed that such women eluded conviction because there were few witnesses to these sorts of births. If caught, the terrified mothers would claim that the child was stillborn or that it died right after birth. Since so many babies died at birth from natural causes anyway, prosecutors were sorely pressed to dispute this.⁴⁷

In response, the early concealment statutes set forth some rather extraordinary rules. There was to be a presumption of guilt, rather than innocence, in such cases. Prosecutors were relieved from having to prove that the mother had actually murdered her illegitimate infant. The mere fact that an infant had died where the mother had been trying to conceal the childbirth was henceforth to merit capital punishment. Courts were instructed to convict unless the accused woman could provide some other person as a witness to her innocence. This witness would have to testify that he or she had seen the mother give birth and that the child had been stillborn. Since the purpose of concealment would have been undone by inviting a witness to attend the birth, it must have been clear to legislators that few women accused of the crime would be able to meet this high burden of proof.⁴⁸

The severity of concealment laws was apparent not only to the women concerned, but also to large sectors of the community.⁴⁹ Even many of the legal officials who were charged with administering the law balked. They strained for evidence which would permit them to evade the draconian implications of a guilty verdict under the capital concealment offence.⁵⁰ Beginning with New Brunswick in 1810, and culminating with Prince Edward Island in 1836, Canadian legislators slowly began to amend the concealment law. They reinstated traditional rules of proof for women

⁴⁶ First enacted in France in the mid-sixteenth century, the law spread to England in 1623 and entered colonial jurisprudence in New France in 1722. For reference to the early French provisions, see *Recueil Général des Anciennes Lois Françaises* (Paris: 1822–33), vol. XIII at 471–73; P.G. Roy, *Inventaire des Ordonnances des Intendants de la Nouvelle-France* (Beaceville, 1919) 1 at 216–17; Ward, *supra* note 5 at 43. See also, *An act to prevent the destroying and murdering of Bastard Children*, 21 James I (1623), c. 27 (Eng.); *An Act relating to Treasons and Felonies*, 32 George II (1758), c. 13 (N.S.); *An Act relating to Treasons and Felonies*, 33 George III (1792), c. 1 (P.E.I.). The other jurisdictions adopted the statute by way of general legislation receiving English law into the colonies.

⁴⁷ For a discussion of the motivation behind the early legislation, see Backhouse, *supra* note 5.

⁴⁸ The wording of a typical statute was as follows: “[I]f any woman be delivered of any issue of her body, male or female, which being born alive, should by the laws of the realm of England be a bastard, and that she endeavour privately, either by drowning or secret burying thereof, or in any other way, either by herself, or the procuring of others, so to conceal the death thereof, as that it may not come to light whether it were born alive or not, but be concealed, the mother so offending shall suffer death as in the case of murder, except such mother can make proof by one witness, that the child whose death was by her so intended to be concealed, was born dead.” [English Act (as received into Upper Canada), s. 2; Nova Scotia Act, s. 5.]

⁴⁹ See, for example, the public outcry which attended the trial of Angelique Pilote, whose sentence of death was commuted in 1818 in Niagara, Upper Canada, as recorded in Backhouse, *supra* note 5 and Backhouse, *supra* note 1, chapter 4.

⁵⁰ The early reported cases reveal the courts’ preoccupation with the technically irrelevant evidence concerning the cause of the child’s death, seemingly reluctant to convict without information which would warrant a finding of murder or manslaughter: see Backhouse, *supra* note 5.

charged with murdering their infants, relegating the concealment crime to the status of a lesser and included offence, subject to a maximum of two years' imprisonment.⁵¹ It was this law, swept into the consolidation process mounted by the federal government when it obtained jurisdiction over criminal law, which ultimately found its way into the *Criminal Code* (1892) as section 240.⁵²

The deputy attorney-general of British Columbia, who acted as the crown attorney in this case, was a thorough, careful prosecutor. His handwritten notes on the back of the coroner's deposition documents reveal that he was worried about his ability to secure Anna Baló's conviction, even on the two year concealment charge. "We should have some better evidence of the birth," he scrawled. His next entry read: "Can the sack be identified?" He must have thought that Alexandra's identification of the silver sixpence was insufficient to tie the body to Anna Baló. He also wanted to locate a new witness, a Mrs. Mattison. Alexandra had revealed at the inquest that Mrs. Mattison, a neighbour, had dropped by the Baló home the week after her mother took sick, while she was still bedridden. The deputy attorney-general must have thought that Mrs. Mattison would be able to offer some first-hand account of Anna Baló's condition.⁵³

The notes also reveal the deputy attorney-general's serious reservations about Anna Baló's confession to Chief Crossan. This he described as her "supposed confession."⁵⁴ Was he worried that a court would decide it had not been made voluntarily? Coming so quickly on the heels of that intrusive physical examination that Dr. O'Brian had carried out on Anna Baló in jail, it just might have struck a jury that the confession was tainted by the events that had preceded it. There were long-standing rules of evidence concerning the acceptability of confessions. Customarily, confessions were treated as inadmissible in court if obtained under coercive circumstances. According to S.R. Clarke's 1872 *Treatise on Criminal Law as Applicable to the Dominion of Canada*, these were important, time-honoured principles of law:

⁵¹ *An Act for making further provisions to prevent the destroying and murdering of Bastard Children*, 50 George III (1810), c. 2 (N.B.); *An Act to repeal 'An Act to prevent the destroying and murdering of Bastard Children'*, 52 George III (1812), c. 3 (Lower Canada); *An Act for repealing... 'An Act relating to Treasons and Felonies'*, 53 George III (1813), c. 11 (N.S.); *An Act to prevent the operation of 'An Act to prevent the destroying and murdering of Bastard Children'*, 2 William IV (1831), c. 1 (Upper Canada); *An Act to provide for the punishment of Offences against the Person*, 6 William IV (1836), c. 22 (P.E.I.).

⁵² Additional amendments also made it possible to charge married women with concealment. For full details of the statutory amendments in the various jurisdictions prior to Confederation, see Backhouse *supra* note 5. The first statute unequivocally to include married women within the scope of the concealment offence was passed in New Brunswick: *Offences against the Person Act*, 1 William IV (1831), c. 17 (N.B.). The first federal legislation was found in *An Act respecting Offences against the Person*, 32-33 Victoria (1869), c. 20 (D.C.). The statute which extended this package of criminal law to British Columbia was *An Act to extend to the Province of British Columbia certain of the Criminal Laws*, 37 Victoria (1874), c. 42 (D.C.).

⁵³ BCARS, Deposition.

⁵⁴ BCARS, *Ibid.*

It is a general and well-established principle that the confession of a prisoner, in order to be admissible, must be free and voluntary. Any inducement to confess held out to the prisoner by a person in authority, or any undue compulsion upon him, will be sufficient to exclude the confession.⁵⁵

The crown attorney anticipated some difficulty in getting Anna Balo's confession into court around such rules.

The Spring Assizes opened on 5 May 1896. Montague William Tyrwhitt Drake, a judge with a dour reputation, strict and to the point, presided.⁵⁶ Anna Balo, without funds and clearly unfamiliar with legal proceedings, appeared without defence counsel. Judge Drake apparently saw no reason to order a court-appointed lawyer for a non-capital offence.⁵⁷ Without legal advice Anna Balo must have had no inkling that the crown perceived its case as weak. After arraignment, the prisoner announced that she intended to plead "guilty" to the charge.⁵⁸ No one contested the identification of the dead infant as Anna Balo's child. No one took issue with the crown's position that Anna Balo had flung the child into the Nanaimo Harbour with the intention of concealing her pregnancy and birth from the community. The perceived inadequacies of Anna Balo's confession suddenly became irrelevant with her decision to plead guilty.

But Anna Balo's big break came at the time of sentencing the next day. His Lordship, Judge Drake, pronounced as follows:

He considered that a nominal punishment would be sufficient under the circumstances, as beyond the mere concealment of birth there was no suggestion of impropriety. The sentence of the Court was 24 hours' imprisonment, and as this dated from the first day of the Assizes, the prisoner was now discharged.⁵⁹

This was truly a "nominal" punishment, a mere slap on the wrist compared with the maximum penalty allowing two years' imprisonment. Anna Balo's immediate discharge provided a clear signal that legal officials were prepared to tolerate, if not exactly condone, the secret disposal of the bodies of dead infants, and potentially even outright infanticide.

With this decision, Judge Drake followed in the footsteps of a long line of male judges and jurors exhibiting similar sentiments in other nineteenth-century infanticide cases. In some areas of the country, up to two-thirds of the courts were issuing outright acquittals of women charged with murder or manslaughter, despite often

⁵⁵ S.R. Clarke, *A Treatise on Criminal Law as Applicable to the Dominion of Canada* (Toronto: 1872) 467. See Beattie, *supra* note 5 at 364–366, for discussion about English rules concerning the reception of confession evidence.

⁵⁶ For details about Justice Drake, see Alfred Watts, Q.C. "The Honourable Mr. Justice Montague W. Tyrwhitt-Drake" (1967) 26 *The Advocate* 225 at 226.

⁵⁷ It was customary for the judge to appoint legal counsel where an impoverished accused person was on trial for a capital offence. Any barrister so appointed would, of course, have the right to decide whether or not to work for free: see Backhouse, *supra* note 1 chapter 4.

⁵⁸ *Nanaimo Free Press*, 5 May 1896; BCARS GR 1727, vol. 589, Bench Book Entries, *R. v. Balo*, 4 May 1896, by M.W.T. Drake.

⁵⁹ *Nanaimo Free Press*, 6 May 1896.

overwhelming and gruesome evidence of maternal guilt. On the lesser charge of concealment, up to nearly half of the women charged were being discharged and released.⁶⁰ If Anna Baló had been legally represented and pleaded not guilty, the chances were good that she would have been acquitted. Lenience in verdicts and sentencing indicated a pervasive sense of tolerance, even compassion, within the legal system toward women accused of infanticide.⁶¹ It also indicated widespread judicial and popular male rejection of the law itself.

Why were legal authorities so 'soft' on these women? First, they seem very sympathetic to the motives which drove women to take the lives of their own offspring. According to the legal authors of an *Upper Canada Law Journal* article in 1862, women frequently destroyed their own flesh and blood out of a "sense of shame," to prevent the "loss of reputation." "The loss of character is the loss of earthly prospects," emphasised the lawyers. "The consequence at times is a life of prostitution, loathsome disease—in a word, a living death."⁶²

It was almost as if the male lawyers believed that these women acted from a sense of honour, to preserve reputation and avoid descent into unimaginably harsh circumstances. If anything, they seemed to have been impressed by the courage and resourcefulness that the women exhibited as they struggled to hold their lives together. There was virtually no discussion of mental illness or insanity. Instead these acts were seen as deliberate and rational steps that women alone took to reassert order upon a situation tragically altered by an illegitimate pregnancy.

Second, the infant victims occupied a position of little status in the nineteenth century. Infant mortality rates were relatively high well into the twentieth century, frequently above 100 deaths for every 1000 live births. Infant death was everywhere

⁶⁰ An examination of the surviving archival court records for Ontario between 1840 and 1900, showed 66.7% verdicts of "not guilty" in charges of murder and manslaughter, and 46.7% verdicts of "not guilty" in charges of concealment. (See Tables 1, 2, and 3 in Backhouse, *supra* note 1 at 462, 465, and 468.) Analysis of the court decisions in the judicial district of Quebec between 1812–1891 showed 60% verdicts of "not guilty" in charges of murder and manslaughter, and 38.8% findings *other* than "guilty" in charges of concealment. (See Tableau 3 in Cliche, *supra* note 5 at 49.)

⁶¹ Similar lenience was not expressed toward those accused of procuring abortions in the nineteenth century. Abortion trials were a rarity then, usually surfacing only when major medical complications or death resulted from an abortion. But in contrast to infanticide verdicts, approximately half of the abortion-related charges in some provinces resulted in guilty verdicts. During abortion trials, in contrast to infanticide cases, courts appeared to be using loose standards of factual proof and legal analysis, convicting despite evidence that would clearly have permitted acquittals if judges and juries had been so inclined: see Backhouse, *supra* note 2. Part of the explanation may have related to who was on trial. Abortion trials typically focused on the abortionist, who was symbolically removed from the immediate desperation of an unwillingly pregnant woman. Distinctions between the sort of women who committed infanticide and those who obtained abortion may also have been relevant. Unlike the impoverished, single women charged with infanticide, women who sought abortions were more representative of the population at large. Many, particularly those who paid relatively high sums of money to professional abortionists, came from the married, middle and upper classes. The medical profession, which lobbied strenuously for stricter criminal prohibition of abortion, made specific reference to class concerns, as well as religious, racial and ethnic biases, leading them to denounce the efforts of Protestant, English-Canadian women of the "respectable classes" to control their fertility: see, for example, (1867) 3 *Canadian Medical Journal* 225 at 226; (1889) 18 *Canadian Medical Record* 18 at 142. For reference to "race suicide" discussions, see McLaren and McLaren, *supra* note 2 at 17.

⁶² (1862) 8 *Upper Canada Law Journal* December at 309.

and everyday, leaving a certain sense of inevitability, even complacency, over its commonness. Many individuals responded to infant death with what would seem to us today to be visibly callous behavior. One remarkable example of this surfaced at a coroner's inquest in Halifax in 1861. Evidence revealed that when the body of an infant was found in an alley behind a rum shop on Water Street, people laughed and joked about the discovery, referring to the body as the "prize in the alleyway."⁶³

Prominent medical authorities frequently referred to infants as somewhat less than human. For example, in his *Crime and Insanity* published in England in 1911, Dr. Charles Arthur Mercier stated:

In comparison with other cases of murder, a minimum of harm is done by [infanticide]. The victim's mind is not sufficiently developed to enable it to suffer from the contemplation of approaching suffering or death. It is incapable of feeling fear or terror. Nor is its consciousness sufficiently developed to enable it to suffer pain in appreciable degrees. Its loss leaves no gap in any family circle, deprives no children of their breadwinner or their mother, no human being of a friend, helper, or companion. The crime diffuses no sense of insecurity.⁶⁴

Victims of infanticide went virtually unnoticed in societies which often treated infants as less than human. Their mothers could not care for them, their fathers would not acknowledge or support them. Nineteenth-century children assumed importance in the eyes of the law when disputes between grown adults arose over custody. Issues regarding the proper descent of male blood lines and the orderly conveyance of family property to future generations brought children's legal status to the fore. In that context, children were traditionally viewed as the property of their fathers, and nineteenth-century courts tended to opt for paternal custody, except in rare cases where the father had serious defects of character considered socially intolerable. Mothers of these children were granted custody only in situations where they lived under the protection of some other male, usually their fathers or brothers, and only if they had not disqualified themselves by an adulterous relationship or some other conduct that judges considered unseemly.⁶⁵ But the women who committed infanticide were primarily poor, working-class, and unmarried, seduced and abandoned by men. There were no blood lines to protect and certainly no estates to be concerned about transferring. In Anna Balo's case, that the child was the offspring of a

⁶³ For details on Ontario infant mortality rates, see "Ontario Registrar-General Report Relating to the Registration of Births, Marriages and Deaths 1880-1979" cited in Joan Oppenheimer, "Childbirth in Ontario: The Transition from Home to Hospital in the Early Twentieth Century" (1983) 75 *Ontario History* 36 at 38. See also, Public Archives of Nova Scotia, RG 41, Coroner's Inquest, 25 April 1861, as described in Wright, *supra* note 5 at 24-5.

⁶⁴ Charles Arthur Mercier, *Crime and Insanity* (London: Williams and Norgate, 1911) at 212-13.

⁶⁵ For a more detailed discussion, see Constance Backhouse, "Shifting Patterns in Nineteenth-Century Canadian Custody Law" in David H. Flaherty, ed., *supra* note 4, vol. I at 212; Backhouse *supra* note 1, chapter 7; Rebecca Veinott, "Child Custody and Divorce: A Nova Scotia Study 1866-1910" in Phillips and Girard, *supra* note 18. Provincial legislation passed first in Canada West in 1855, New Brunswick in 1890, Nova Scotia in 1893, and British Columbia in 1897 eroded the dominance of paternal custody rights to some extent; but Canadian judges tended to apply the new rules reluctantly, greatly diminishing the force of the reforms. For an American comparison, see Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985).

"foreigner" would have consigned the infant to even greater social margins. These were infants whose interests the courts could afford to ignore almost completely.

Finally, the lenience of the courts was at least in part a response to the desperate plight of most women charged with child-murder or abandonment. There were simply no options. Child-welfare agencies which might have provided facilities for unwanted children barely existed. In the meantime, a woman who could not care for her own infant faced painfully few, mainly unpalatable alternatives. In some areas, neighbourhood women took unwanted infants into their own homes. They did this as a business and charged a lump sum or regular fees. Occasionally they would also place these infants for private adoption. Vituperatively described as "baby farms," these homes came under increasing criticism by the turn of the century for their high infant death rates. Accusations were regularly voiced that the infants in these homes were deliberately murdered through neglect or drug overdose. But in Anna Balo's case, she would no doubt have been unable to afford the required fees, even if she had been able to find a willing home.⁶⁶

In some larger cities, charitable organisations and religious institutions had begun to establish "Infants' Homes" to look after deserted children. Operating on "voluntary contributions," religious donations, and in some cases small government grants, these homes also had infant death rates that were shockingly high. La Creche D'Youville, managed in Montreal by the Grey Nuns, accommodated over 15,000 abandoned children between 1801 and 1870. Between 80 and 90% died while under institutional care.⁶⁷

There were no such institutionalised resources whatsoever in Nanaimo. In the whole province of British Columbia by the end of the nineteenth century there were only three. The closest "Infants' Home" Anna Balo could have found would have been in Victoria, where the Roman Catholic Orphanage and the Protestant Orphan Home competed for 'clients'. There were considerable tensions between the Finnish Lutheran churches and the more established religions in Canada, and a Finnish immigrant would have been unlikely to feel comfortable seeking assistance from either. Even if she had wished to try, and been able to secure transportation with the child to Victoria, it is by no means clear that the child's future would have been significantly different. Women for whom child-rearing created impossible demands often chose infanticide out of necessity, and the courts by and large respected their decisions.⁶⁸

⁶⁶ For a brief discussion of baby-farming, see Backhouse, *supra* note 5. There was a series of prominent cases in the late nineteenth century where the owners of "baby farms" were charged with child-murder, and legislation soon sprang up to regulate these organisations. Further research would be necessary to determine whether the accusations made against "baby farmers" were fair, or whether social reformers were motivated primarily by the taint of sexual license that surrounded illegitimate births, and a dislike of the class of women who ran such establishments.

⁶⁷ For details, see Peter Gossage "Les Enfants Abandonnés a Montreal au 19e Siècle: La Crèche D'Youville Des Soeurs Grises 1820-1871" (1986-87) 40 *Revue d'histoire de L'Amérique Française* 537. For a description of all of the institutionalised infants' homes operated in Canada in 1900, see National Council of Women of Canada, *supra* note 11 at 324-40.

⁶⁸ National Council of Women of Canada, *supra* note 11 at 340. The Protestant, Methodist, Congregationalist and Presbyterian churches were actively seeking to convert "foreigners" in Canada during this period, and the Finnish Lutherans were often targets. (Lindstrom-Best, *supra* note 32 at 130.)